SERVED: July 22, 1994

NTSB Order No. EA-4223

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of July, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JOSEPH ORAN RICHARD, Respondent.	)	Docket SE-13657

OPINION AND ORDER

Both the Administrator and respondent have appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of a two-day evidentiary hearing held in this case on June 22 and 23, 1994.[1] In that decision, the law judge affirmed in part and reversed in part an emergency

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

order revoking respondent's commercial pilot certificate based on two incidents of alleged low flight, and reduced the sanction to a 30-day suspension. For the reasons discussed below, the Administrator's appeal is denied and respondent's appeal is granted.

The emergency order/complaint alleged as follows:

COUNT I

* * *

2. On August 5, 1993, you acted as pilot in command of a Bell model BHT 206 helicopter, Civil Aircraft N376M, operating in air commerce in the vicinity of the Intercoastal [sic] Waterway, approximately four miles south of the Southland Field Airport, Sulphur, Louisiana.

3. During the flight described in paragraph two (2), when it was not necessary for takeoff or landing, you operated N376M over a boat and its two occupants on the Intercoastal [sic] Waterway at an altitude estimated to be between 10 and 50 feet.

4. Your operation of N376M at these low altitudes, if a power unit had failed would not have allowed an emergency landing without an undue hazard to persons or property on the surface.

5. Your operation of N376M under these circumstances was careless or reckless so as to endanger the life or property of another.

COUNT II

* * *

2. On April 14, 1994, you acted as pilot in command of a Bell model BHT 206 helicopter, Civil Aircraft N376M, with a passenger on board, operating in air commerce in the vicinity of the Choupique Bayou off the Intercoastal [sic] Waterway, approximately four miles south of the Southland Field Airport, Sulphur, Louisiana.

3. During the flight described in paragraph two (2), when it was not necessary for takeoff or landing, you operated N375M [sic] over a boat and its three occupants at an altitude estimated to be 50 feet or less.

4. Your operation of N375M [sic] at these low altitudes, if a power unit had failed, would not have allowed an emergency landing without an undue hazard to persons or property on the surface.

5. Your operation of N375M [sic] under these circumstances was careless or reckless so as to endanger the life or property of another.

By reason of the foregoing, you violated [14 C.F.R. 91.119(a) and (d), and 91.13(a)[2]].

* * *

In determining the appropriate action to take in this case, we have also considered the following:

1. By virtue of Notice of Proposed Certificate Action dated January 20, 1994, you were advised by the Federal Aviation Administration that your helicopter operation described in Count I of this Order violated Sections 91.119(a), 91.119(d) and 91.13(a) of the Federal Aviation Regulations.

2. On March 9, 1994, you attended an Informal Conference in Baton Rouge, Louisiana, at which time Federal Aviation

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[2] **§ 91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere*. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

* * *

(d) *Helicopters*. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface.

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

> Administration representatives discussed with you the seriousness of operating a helicopter in the manner described in Count I of this Order.
>
> 3. Your actions in continuing to engage in low flight helicopter operations over persons or property on the surface, as described again in Count II and occurring within six weeks of the Informal Conference, can, therefore, only be regarded as deliberate and intentional.

It is undisputed that respondent operated his helicopter in the vicinity of a small boat occupied by recreational fishermen on both occasions cited in the complaint. The two fishermen allegedly overflown in the first incident were also part of the four-member fishing party involved in the second incident. There was conflicting testimony regarding the height of the helicopter and its proximity to the boat, and whether respondent could have safely performed an auto-rotational landing[3] in the event of a power failure during these operations.

Regarding the first incident, the fishermen testified that, after respondent's helicopter followed them down the Intracoastal Waterway at approximately 35-40 miles per hour, they stopped their boat and respondent's helicopter proceeded to hover at 10-30 feet above the water at various points close to the boat. (Both retreated, however, from their earlier assertion to the FAA that the helicopter had hovered directly over the boat.) They testified that the helicopter's rotor wash caused water to blow up around the boat. One of the two testified that a life jacket

[3] Auto-rotation refers to a helicopter's ability to maintain lift, even after an engine failure, due to the continued turning of the main rotor blades. Thus, a safe landing may be accomplished by auto-rotation after a power failure.

blew out of the boat.[4] The FAA's investigating inspector, who is experienced in helicopter operations, opined that, at those altitudes, it was very unlikely that respondent could have made a safe auto-rotational landing in the event of a power failure without causing undue hazard to the boat and its occupants.

Respondent readily admitted that he flew alongside the boat as it was traveling down the canal, but claimed his purpose was simply to obtain the registration numbers on the boat.[5] He maintained that he flew no lower than 130 feet, and stated that when the boat stopped, he landed on the northern bank of the Waterway and obtained the registration numbers by using binoculars. Respondent presented expert opinion testimony from a former Bell Helicopters experimental test pilot who collected the data on which the height-velocity curves and other data in the helicopter manual is based. Both respondent and his expert testified that respondent could have completed a safe auto-rotational landing, even from the low altitudes testified to by the fishermen. It should be noted that respondent's helicopter was equipped with pop-out floats for emergency water landings. Although the helicopter manual apparently states that the floats

[4] The other testified that he did not see a life jacket blow out of the boat, but would not discount the possibility that it happened. (Tr. Vol. 1, 173.)

[5] Respondent explained that, due to recent thefts from his property in that area, he wanted to identify boats and persons on his property. He stated that he could see, from the trail the boat left in the water, that it had just come from the southern bank of the Intracoastal Waterway, which abuts respondent's leased property.

will inflate in five seconds, respondent testified that, when tested, his floats inflated in approximately one and a half seconds. Respondent's expert, who was involved in testing the floats prior to their certification, confirmed that, despite the five-second time specified in the manual, most floats will deploy within one and a half to three seconds.

During the second incident, the same fishing boat was tied up in a small inlet (referred to as a drainage canal or "cut") adjoining the Intracoastal Waterway, leading into respondent's leased property. The three fishermen in the boat at the time of the alleged low flight testified that respondent circled the area where they were fishing at tree-height, which was estimated to be between 35-50 feet, and then landed his helicopter some distance away. After he landed, respondent and his passenger approached the four fishermen[6] and told them they were trespassing. An argument then ensued between respondent and one of the two fishermen who had lodged the complaint with the FAA regarding the earlier incident, and the fisherman became verbally abusive to respondent and waved his hand while holding an open fishing knife. As a result of this incident, respondent filed trespassing charges against the fishermen.

Although they had indicated in their prior joint statement to the FAA that respondent hovered directly over the boat, the fishermen generally agreed at the hearing that respondent did not

[6] In addition to the three in the boat, a fourth was fishing from the bank.

hover but merely slowed down, and at least one witness stated that -- contrary to their earlier statement -- respondent was never directly over the boat. There was no testimony regarding any significant rotor wash, as there was regarding the first incident, and none of the fishermen testified that they felt endangered by respondent's operation. One stated explicitly that he had no problem with respondent's flying on that occasion.

Respondent and his passenger testified that during the second incident they flew no lower than 150 feet in the vicinity of the boat, and denied that they flew or hovered directly over the boat. Respondent and his expert testified that, if necessary, an auto-rotational landing could have been accomplished, even from the altitudes testified to by the fishermen, without causing a hazard to the boat or its occupants.

The law judge credited the fishermen's testimony regarding the height of respondent's helicopter (10-30 feet) during the first incident, but relying on respondent's expert's testimony that a safe auto-rotation could still have been accomplished, found no violation of section 91.119(a). However, based on the "swirling water" caused by respondent's rotor wash, and the fear one of the fishermen stated he felt during the incident, the law judge affirmed the violation of section 91.119(d) and a residual violation of section 91.13(a).[7]

[7] After citing these two reasons (swirling water and fear), the law judge appeared to retreat somewhat from the first, stating, "as I indicated, the only hazard that I found is this swirling water, and I don't know that it is a hazard. Although, I do know that the Board has ruled that blowing sand and those

With regard to the second incident, the law judge found no evidence that the helicopter was ever directly over the boat. He did not resolve the conflicting testimony regarding respondent's altitude, but, again relying on respondent's expert's testimony that respondent could have landed safely from any of the altitudes testified to in the event of a power failure, he found there was insufficient evidence of any regulatory violation. The law judge also stated that the fishermen were obviously trespassing on respondent's property, and concluded that this affected their credibility, at least as to the second incident. He noted respondent's passenger's testimony that one of the fishermen present during the second incident, upon being told he was trespassing, said he had been fishing there all his life and respondent had better get a lot of fuel because he intended to continue fishing there.[8]

On the issue of sanction, the law judge made clear that he thought revocation was wholly unwarranted, even if both incidents had been proven. He cited Essery v. DOT, 857 F.2d 1286 (9th Cir. 1988), where the court held that -- in keeping with the FAA's policy mandating uniformity of sanctions for similar violations -- the two incidents of low flight involved in that case did not

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little things that may or may not cause some damage, but I do believe Mr. McDowell has indicated some fear, and that's the sole basis for my finding." (Tr. Vol 2, 257-58.)

[8] Though the fisherman in question denied having said this, we view the law judge's reference to this statement as a credibility finding in favor of respondent's passenger's testimony that the statement was made.

warrant revocation, but rather only a 120-day suspension. In light of the expert testimony that respondent could have landed safely, and the fact that the fishermen were trespassers, the law judge concluded that a 30-day suspension was appropriate for what he found to be respondent's violations of section 91.119(d) and 91.13(a) during the first incident. The law judge also noted that, unlike the violations in Essery, which occurred over congested urban locations, these incidents occurred over a remote uninhabited area.

On appeal, the Administrator challenges the law judge's dismissal of the section 91.119(a) charges with respect to both incidents. He argues that -- contrary to respondent's expert's testimony -- it would have been impossible for respondent to deploy the helicopter's pop-out emergency floats in the "few" seconds respondent admitted it would take to auto-rotate to the surface from an altitude of 20 feet. The Administrator asserts that the law judge was obligated to accept the five-second deployment time for the emergency floats listed in the helicopter manual, despite respondent's and his expert's testimony that the floats would deploy in less time than that. We need not resolve this dispute, however, because there is sufficient evidence in the record from which the law judge could conclude that respondent would have had at least five seconds for deployment of the floats. Specifically, respondent explained that by "a few" seconds, he meant four or five.[9] (Tr. Vol. 2, 98.) The

[9] We note also that the fishermen's testimony, credited by

Administrator presented no evidence to contradict this estimate of how long such an auto-rotation would take. Further, the Administrator's expert's opinion that respondent would be unable to safely auto-rotate to the surface did not appear to be based on the deployment time of the floats. Indeed, he acknowledged that in his experience such floats came out "very quickly." (Tr. Vol. 1, 253, 283.)

The Administrator also asserts that the law judge improperly found that the fishermen were trespassers, and points out that the law judge stated repeatedly that the issue of whether or not they were trespassing was irrelevant to the violations at issue, and essentially precluded evidence on the issue. The Administrator submits that the Intracoastal Waterway where the first incident occurred, and the small canal where the second incident occurred, are both navigable waterways and therefore state-owned. We think it is obvious, however, that the law judge's conclusion that the fishermen were trespassing was based on their activities on *land*, not their presence on the water. Despite the law judge's attempt to de-emphasize this issue, there is ample evidence in the record indicating that the fishermen were indeed trespassing on private land, and that they knew it.[10]

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the law judge, was that respondent was somewhere between 10 and 30 feet. Thus, the record supports a finding that respondent was as high as 30 feet above the water.

[10] In both incidents, the fishermen admitted they had been on land prior to the helicopter's arrival, and returned to the boat only after noticing respondent's helicopter. Both fishermen involved in the first incident admitted to seeing "no trespassing" or "posted" signs on the property where they were

One could also easily infer that the fishermen would be interested in continuing to fish on the land without respondent's interference.[11] We think the law judge could properly consider these factors in determining credibility.[12]

The Administrator also challenges the law judge's refusal to permit several additional witnesses to testify on behalf of the Administrator regarding other incidents where respondent allegedly flew low in the vicinity of other boats. However, we find no abuse of discretion in the law judge's exclusion of this testimony, as it would not have added to our analysis of the key issue in this case: whether respondent's operations created a hazard to the persons and property below.[13] Moreover, we think

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fishing. Further, we think that the statement by one of the fishermen that he had once had permission to fish on this property, and another's assertion that he currently had authorization to fish on another apparently nearby property, indicates an awareness that the land was privately-owned. All of them acknowledged that they did not currently have permission to fish on the property here at issue. Although the Administrator asserts that this testimony is of no import since they were not required to have permission, we think the record taken as a whole belies this assertion.

[11] Respondent described his land as a "paradise" for hunting and fishing, and testified that unauthorized use of the land is common. (Tr. Vol. 2, 145, 135.) Respondent noted that the only effective way to patrol the property for trespassers is by helicopter. (Tr. Vol. 2, 135.)

[12] We note that the law judge's rejection of the fishermen's testimony regarding the second incident is of questionable significance, since he appears to have held that no violation occurred on that occasion even assuming the truth of their testimony. (Tr. Vol. 2, 255.)

[13] The gravamen of the violations alleged in this case is not so much whether respondent operated close to boats (the apparent focus of the Administrator's proffered evidence), but whether that proximity caused a hazard to the persons and

the Administrator's failure to notify respondent that he intended to present witnesses regarding the other alleged low flights further supports the law judge's exclusion order.[14]

Finally, with regard to sanction, the Administrator takes issue with the law judge's interpretation of Essery, noting that Essery involved conduct found to be only careless, and not reckless, and argues that respondent's conduct in this case was reckless. He asserts that even one incident of recklessness can justify revocation, and maintains that revocation is the proper sanction in this case, even for the reduced violations affirmed by the law judge. In light of our dismissal of the charges found proven by the law judge (discussed below), we need not address the Administrator's sanction argument.[15]

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property below.

[14] In spite of respondent's repeated efforts to initiate an exchange of witness lists and exhibits prior to the hearing (see Exhibits R-2 and R-3), the Administrator apparently did not provide this information to respondent. We reject the Administrator's position that respondent's letters merely "suggested" that the information should be exchanged, and do not constitute legitimate discovery requests.

Further, the Administrator incorrectly states that, in any event, discovery is not available in emergency proceedings, noting that Subpart I of our rules of practice (49 C.F.R. Part 821), setting forth special rules pertaining to emergencies, does not mention discovery. However, Subpart B of our rules of practice -- which contains general rules, including rules regarding discovery -- provides for discovery in all cases, including emergencies. See Administrator v. Stricklen, NTSB Order No. EA-3814 at 14 (1993).

[15] We note, however that the Administrator's assertion that revocation is warranted by the first incident alone seems inconsistent with his order of revocation, which indicates on its face that his decision to seek revocation was heavily influenced by what he viewed as respondent's "deliberate and intentional"

In his appeal, respondent challenges the law judge's credibility finding in favor of the fishermen's testimony regarding the first incident, and also argues that more than a subjective evaluation of hazard (presumably a reference to the fear felt by one of the fishermen) was necessary to sustain the violation of section 91.119(d) affirmed by the law judge. The law judge's finding of violation appears to rest solely on the swirling water caused by respondent's rotor wash, and the fear felt by one of the fishermen.[16] We agree that more was required. We have held that this section speaks to actual, not potential, hazards. Administrator v. Reynolds, 4 NTSB 240 (1982). We see no evidence in this record that the swirling water or the fisherman's fear presented any sort of actual hazard in this case. Accordingly, the section 91.119(d) violation found by the law judge is dismissed.

Our dismissal of the section 91.119(d) charge renders moot respondent's argument that no residual finding of a section 91.13(a) violation was warranted, since there was insufficient evidence of careless or reckless operation. We nonetheless note our case law makes clear that such a residual violation[17] is

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second violation.

[16] But see footnote 7.

[17] A residual violation is one which flows solely from a respondent's violation of another, independent, regulation. A residual violation has no effect on sanction. We have held that the finding of a violation of an operational provision of the Federal Aviation Regulations, without more, is sufficient to support a finding of a "residual" or "derivative" 91.13(a) violation. Administrator v. Pritchett, NTSB Order No. EA-3271 at

justified without additional proof when an operational violation has been found, even in helicopter cases where proof of an unacceptably high likelihood of potential harm or clearly deficient judgment would be necessary to establish an independent violation of that regulation. See Administrator v. Tur, NTSB Order No. EA-3490 at 9, n. 12 (1992) and Administrator v. Frost, NTSB Order No. EA-3856 at 8 (1993). Finally, with regard to respondent's argument that the law judge should have allowed him to present evidence regarding the Administrator's allegedly negligent investigation of the complaints made against respondent, we agree with the law judge that the conduct of the investigation is irrelevant to our adjudication of this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;

2. Respondent's appeal is granted; and

3. The initial decision is affirmed in part and reversed in part, as set forth in this opinion and order.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

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8 (1991); Administrator v. Thompson, NTSB Order No. EA-3247 at 5, n. 7 (1991).